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## Uniform Conditional Sales Act--An Annotation

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dence to support it, 'if there (is) sufficient evidence to warrant a conviction of rape.' As the evidence in the Collins case showed that if rape had been committed, the defendant was the sole actor in the consummation of the crime, point 2 of the syllabus in the Collins case is broader than is required for a decision of the case, and the holding of this Court, as disclosed by the opinion and the facts contained therein." The court concludes that ". . . the broad language embraced in point 2 of the syllabus of the Collins case . . . should, in our opinion, not be carried on in the decision of the instant case."<sup>19</sup> It is important to note that the court cited other articles in the *Law Quarterly* on the subject, and that these articles represent the view that the syllabus is not "the law" in West Virginia.<sup>20</sup> The case thus, as indicated earlier, squarely presents the question of the role of the syllabus and indicates that it must be read in the light of the opinion; that the syllabus may be broader than justified by the opinion; thus the court indicates the syllabus is only an official headnote prepared for the general information of the legal profession and public at large, and the court expressly disapproved the dictum in the *Burdette* case. It is further submitted that those who believe the syllabus represents the law of an adjudicated case are forced to admit otherwise, for here in the syllabus, the court states that the syllabus of the *Collins* case was read in the light of the opinion<sup>21</sup>—an interesting paradox for those who believe the syllabus is "the law" in West Virginia.

J. L. McC.

UNIFORM CONDITIONAL SALES ACT—AN ANNOTATION.—With the advent of extensive credit buying, there has been an increased interest in the law of secured transactions. Therefore, it seems timely to discuss one of the more commonly used security devices, the conditional sale, as affected by West Virginia law.

The Uniform Conditional Sales Act,<sup>1</sup> was adopted in West Virginia in 1921<sup>2</sup> and was reenacted in 1925.<sup>3</sup> The present version

<sup>19</sup> State v. Franklin, 79 S.E.2d 692, 699-700, 703 (W. Va. 1953).

<sup>20</sup> *Id.* at 700. "For an illuminating and learned discussion of the function of the syllabus of a case decided by this Court, see 'The Law—In W. Va.', by Thomas P. Hardman, Dean of the College of Law of West Virginia University, 47 W. Va. L.Q. 23, and note by Dean Hardman, 47 W. Va. L.Q. 209."

<sup>21</sup> See note 1 *supra*.

<sup>1</sup> W. VA. CODE c. 40, art. 3 (Michie 1955).

<sup>2</sup> W. Va. Acts 1921, c. 75.

of the act<sup>4</sup> is little changed from the 1925 act. Prior to its adoption in 1921, there were domestically drafted statutory provisions regulating the validity and recording of conditional sales.<sup>5</sup> The uniform act is to be interpreted so as to maintain uniformity of result throughout the states adopting the act.<sup>6</sup> The original draft was approved by the Commissioners on Uniform State Laws in 1918,<sup>7</sup> and has been adopted by 12 jurisdictions.<sup>8</sup> In 1943, the act was withdrawn, being superseded by the Uniform Commercial Code,<sup>9</sup> promulgated in 1951,<sup>10</sup> which has since been enacted by Pennsylvania alone.<sup>11</sup> This note will be concerned with the West Virginia act,<sup>12</sup> in three particulars: (1) legislative expression; (2) judicial interpretation; and (3) jurisdictional comparison.

### *Legislative Expression*

The Uniform Conditional Sales Act was adopted to provide an efficient system for the filing and perfecting of conditional sales and "to make uniform the law relating thereto."<sup>13</sup>

By and large, the West Virginia act conforms to the wording of the act as promulgated by the Commissioners on Uniform State Laws.<sup>14</sup> There are certain clarifying words added, in no way

<sup>3</sup> W. Va. Acts 1925, c. 64.

<sup>4</sup> W. VA. CODE c. 40, art. 3, §§ 1 through 32 (Michie 1955).

<sup>5</sup> W. VA. CODE c. 74, § 3 (1868).

<sup>6</sup> W. VA. CODE c. 40, art. 3, § 31 (Michie 1955).

<sup>7</sup> HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS SIXTY-THIRD YEAR 279 (1954).

<sup>8</sup> *Id.* at 282; Alaska, Arizona, Delaware, New Hampshire, New Jersey, New York, South Dakota, West Virginia and Wisconsin, and with modifications in Hawaii, Indiana and Pennsylvania.

<sup>9</sup> *Id.* at 282.

<sup>10</sup> *Id.* at 225.

<sup>11</sup> *Id.* at 225; as of December 1, 1954. Should West Virginia adopt the Uniform Commercial Code, a concentrated study of its provisions as affecting the West Virginia decisions passing on the Uniform Conditional Sales Act would be necessary, since the Uniform Commercial Code considerably modifies and rewords the provisions relating to conditional sales; see UNIFORM COMMERCIAL CODE art. 9 (1952).

<sup>12</sup> W. VA. CODE c. 40, art. 3 (Michie 1955).

<sup>13</sup> W. Va. Acts 1921, c. 75; see Jones, *Uniform State Laws—Reasons for Their Further Enactment in West Virginia*, 26 W. Va. L.Q. 121 (1920); Note, 26 W. VA. L.Q. 139 (1920).

<sup>14</sup> See 2 UNIFORM LAWS ANN. (1922) (hereinafter cited as 2 U.L.A.) for the provisions of the Uniform Conditional Sales Act as promulgated by the commissioners.

changing the content of the act.<sup>15</sup> The statute, in reference between sections, specifies that it is an "article" rather than an "act,"<sup>16</sup> which is consistent with the code system of subdivision. The numbering is different within sections, and the word "county" has been used instead of "filing district."<sup>17</sup>

Obviously, these do not change the meaning of the act from the meaning intended by the Commissioners on Uniform State Laws. However, there are a few sections which *do* change the meaning of the promulgated act, some materially. These will be considered in order. Section 5,<sup>18</sup> which specifies those creditors and purchasers protected by a failure to record as required by the act, has been amended to extend its coverage to liens not acquired by attachment or levy, otherwise a landlord's lien is not protected ". . . and it is doubtful whether other liens 'acquired by operation of law or judicial process' are protected."<sup>19</sup> It is so extended by the addition of the words "or otherwise" after "acquires [a lien] by attachment or levy." Section 6 provides, *inter alia*, for filing in the office "of the clerk of the county court in the county" in which the goods are to be first taken.<sup>20</sup> However, this is in no way a change of the original draft, since it was intended that the individual states were to supply the place of filing.<sup>21</sup> Section 8 has a similar "filling in" for the filing of conditional sales contracts, or copies thereof, of railroad equipment, rolling stock, watercraft and barges, in the office of the "secretary of state."<sup>22</sup> However, that same section has been extended to include commercial watercraft and barges or any equipment thereon, in addition to the railroad equipment and rolling stock covered by the original draft of the Commissioners on Uniform State Laws.<sup>23</sup> In section 10, a flat fee of seventy-five cents is

<sup>15</sup> See W. VA. CODE c. 40, art. 3, § 7 (Michie 1955), where "of the realty" and §§ 17, 18, 19, 20 and 23 where "of this article" are added for clarification. There are other instances in the Code of similar additions.

<sup>16</sup> W. VA. CODE c. 40, art. 3, § 1 (Michie 1955).

<sup>17</sup> See W. VA. CODE c. 40, art. 3, §§ 13, 14 and 19 (Michie 1955).

<sup>18</sup> W. VA. CODE c. 40, art. 3, § 5 (Michie 1955).

<sup>19</sup> W. VA. CODE c. 40, art. 3, Revisers' Note to § 5 (Michie 1955); *Rapoport v. Rapoport Express Co.*, 90 N.J.Eq. 519, 107 Atl. 822 (1919); and see *Bent v. Weaver*, 106 W. Va. 164, 167, 145 S.E. 594 (1928), wherein the court cites the *Rapoport* case, *supra*, and indicates it would hold in accord therewith if similar facts were presented.

<sup>20</sup> W. VA. CODE c. 40, art. 3, § 6 (Michie 1955).

<sup>21</sup> 2A UNIFORM LAWS ANN. § 51 (1924) (hereinafter cited as 2A U.L.A.).

<sup>22</sup> W. VA. CODE c. 40, art. 3, § 8 (Michie 1955).

<sup>23</sup> *Ibid.*; cf. 2A U.L.A. § 71.

provided for filing the conditional sale contract under either of the filing sections, whereas the corresponding section of the draft of the commissioners provided for a fee of ten cents for all contracts, except those described in section 8, which provided a fee of one dollar.<sup>24</sup> Section 11, concerning the period of validity of conditional sales, is virtually a copy of the draft of the commissioners,<sup>25</sup> except that the period of validity is increased from three to five years, and the period of extension beyond the initial five year period is increased from one to two years.<sup>26</sup> Section 12 is a copy of the draft by the commissioners, providing for cancellation of the contract, except that it provides for a fee of thirty-five cents to the clerk, instead of ten cents.<sup>27</sup> Section 15 of the draft by the commissioners,<sup>28</sup> provides that any destruction with malice or intent to defraud, or any removing of the property by the buyer to a filing district where not filed, without giving the seller notice thereof, or otherwise disposing of the property with claim of full ownership, constitutes a crime. The West Virginia act divides the possible circumstances into three situations: (1) where the amount due is less than twenty dollars, it is a misdemeanor; (2) where the amount is more than twenty dollars, it is a felony if done with malice or with an intent to defraud; and (3) where it is more than twenty dollars but is done without malice or an intent to defraud, it is a misdemeanor.<sup>29</sup> The draft of the commissioners<sup>30</sup> makes no provision for the case of a taking, destroying or removing without malice or intent to defraud.<sup>31</sup> There is no section in the draft of the commissioners comparable to section 30 of the West Virginia act,<sup>32</sup> providing for the destruction of the filed contract by the clerk of the county court after the contract has ceased to be valid for five years. The draft of the commissioners has two sections which the

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<sup>24</sup> 2A U.L.A. § 85; however, the amounts were set in brackets, indicating no violation of uniformity was contemplated by different states having different fees.

<sup>25</sup> 2A U.L.A. § 85.

<sup>26</sup> W. VA. CODE c. 40, art. 3, § 11 (Michie 1955); prior to the 1933 amendment of this section it conformed to the draft of the commissioners [see W. VA. CODE c. 40, art. 3, § 11 (Michie 1932)].

<sup>27</sup> W. VA. CODE c. 40, art. 3, § 12 (Michie 1955).

<sup>28</sup> 2A U.L.A. § 90.

<sup>29</sup> W. VA. CODE c. 40, art. 3, § 15 (Michie 1955). Note: this section provides that, "Any such removal without notice having been given shall be deemed prima facie fraudulent."

<sup>30</sup> 2A U.L.A. § 90.

<sup>31</sup> See Revisers' Note to W. VA. CODE c. 40, art. 3, § 15 (Michie 1955).

<sup>32</sup> W. VA. CODE c. 40, art. 3, § 30 (Michie 1955).

West Virginia act does not contain.<sup>33</sup> It is believed that these changes from the draft by the commissioners are not so drastic that the act cannot be considered to be truly a uniform act.

### *Judicial Interpretation*

The act is constitutional; it does not impair the right of contract,<sup>34</sup> the title serves as a fair and reasonable index to the purposes of the legislation, even though it is general in terms,<sup>35</sup> it is not subject to the objections of special or class legislation, since it operates alike on all persons and property similarly situated,<sup>36</sup> and it does not violate the federal guaranty of equal protection of the laws.<sup>37</sup>

Before the provisions of the act can be invoked, there must be a valid contract of sale upon condition. Thus, in *Toledo Scale Co. v. Bailey*,<sup>38</sup> where conditional sale contracts made by an agent required the approval of the principal no requirement for recording attaches before approval, since until that time there is no valid conditional sale contract. Property of the principal given to his agent remains the principal's property, and no filing is necessary, for this is not a conditional sale.<sup>39</sup> The contract reserving title in the vendor must be made contemporaneously with the sale or before delivery of possession of the property to the vendee by the vendor.<sup>40</sup>

<sup>33</sup> 2A U.L.A. § 150; these are entitled: "Inconsistent Laws Repealed" and "Time of Taking Effect." W. Va. Acts 1925, c. 64, contained the former of these sections, but the revisers later omitted it as being unnecessary.

<sup>34</sup> *Underwood v. Raleigh Transportation, Equipment & Construction Co.*, 102 W. Va. 305, 135 S.E. 4 (1926).

<sup>35</sup> *Bent v. Weaver*, 108 W. Va. 299, 150 S.E. 738 (1929).

<sup>36</sup> *Bent v. Weaver*, *supra* note 35.

<sup>37</sup> *Bent v. Weaver*, *supra* note 35.

<sup>38</sup> 78 W. Va. 797, 90 S.E. 345 (1916), decided before the Uniform Conditional Sales Act was adopted in West Virginia.

<sup>39</sup> *Barnes Safe & Lock Co. v. Block Brothers Tobacco Co.*, 38 W. Va. 158, 18 S.E. 482 (1893); *General Electric Co. v. Martin*, 99 W. Va. 519, 130 S.E. 299 (1925), in which the court, at 523, enumerated the following considerations as influencing its decision: that the wholesaler reserved the right to dispose of the goods or take them back at any time, that the wholesaler controls the retail price, that there was no duty on the retailer to pay until and unless he sold the goods, that the retailer was to retain as profit a certain percentage of the receipts from sale, that the retailer was required to keep account books regarding the goods sent him by the wholesaler, and their proceeds, that both retailer and wholesaler were to have the right to sell from the stock delivered to the retailer, and that the contract contained no provision for the passage of property.

<sup>40</sup> *Hyder v. Smith*, 48 W. Va. 550, 37 S.E. 632 (1900).

In a trial involving the provisions of the act, proof of a conditional sale contract must be made.<sup>41</sup>

The portion of section 5<sup>42</sup> providing for filing of the conditional sale contract within ten days after the making of the conditional sale contemplates a ten-day period running from the time of the delivery of the goods into the hands of the purchaser.<sup>43</sup> The ten-day period provided in the statute seems to be a "grace" period during which the conditional seller is absolutely protected, providing he files at some time during that period.<sup>44</sup> Even if the conditional sale contract is filed *after* the ten day period, if it is filed *before* the claims of any creditors attach or sale to bona fide purchasers, the conditional seller is protected as to any claims arising *after* the filing.<sup>45</sup> There is an absolute necessity for compliance with the act and failure to do so will defeat the seller's retention of title, if there is in substance a conditional sale regardless of the name given to the transaction by the parties.<sup>46</sup> Once the retention of title has been perfected by recordation in one county, removal to another county does not in any way affect the seller's rights. Only failure to record in the county into which the goods are removed within ten days *after* receiving notice of the removal will defeat the seller's rights.<sup>47</sup>

Apparently, the seller is under no obligation to inquire as to the location of the goods after the conditional sale contract is

<sup>41</sup> *Midland Investment Co. v. Nelson*, 107 W. Va. 220, 148 S.E. 9 (1929) (*semble*); the court does not indicate how much proof is sufficient, but it states that an "intimation" by the defendant that he holds a conditional sale contract is not sufficient.

<sup>42</sup> W. VA. CODE c. 40, art. 3, § 5 (Michie 1955).

<sup>43</sup> *Guthrie v. Howie*, 110 W. Va. 164, 157 S.E. 168 (1931), in which the court quotes 2A U.L.A. § 3, with approval, in arriving at this conclusion. *Cf.* *The Webster Co. v. Keystone Lumber & Mining Co.*, 51 W. Va. 545, 42 S.E. 632 (1902); *Curtin v. Isaacsen*, 36 W. Va. 391, 15 S.E. 171 (1892), which hold that the vendor has a lien upon the goods for their price, unless stipulated otherwise, so long as they remain in his possession, even though the reservation of title is not recorded.

<sup>44</sup> *Hawley v. Levy*, 99 W. Va. 335, 128 S.E. 735 (1925) (*semble*); see *Bent v. Weaver*, 106 W. Va. 164, 169, 145 S.E. 594 (1928). For a full discussion of this and related problems concerning the filing of conditional sales contracts under the West Virginia act see: Abel, *Conditional Sellers, Hostile Claimants, and the Filing Period*, 47 W. VA. L.Q. 73 (1941).

<sup>45</sup> *Bent v. Weaver*, 106 W. Va. 164, 145 S.E. 594 (1928); Abel, *supra* note 44.

<sup>46</sup> *Huffard v. Akers*, 52 W. Va. 21, 43 S.E. 124 (1902); *D. H. Baldwin & Co. v. Wagner*, 33 W. Va. 293, 10 S.E. 716 (1889).

<sup>47</sup> *Banks-Miller Supply Co. v. Bank of Marlinton*, 106 W. Va. 583, 146 S.E. 521 (1929).

executed.<sup>48</sup> In *Brown v. Woody*,<sup>49</sup> the court says: "Actual notice is as potent as constructive notice; and if a creditor or purchaser with actual notice of the seller's rights seeks to take the property, he is on no higher ground than if he had purchased, or obtained a lien after due recordation of the conditional sale contract."<sup>50</sup> When there has been a valid contract with another to file the contract, or presumably to give actual notice thereof, the seller can collect his damages from the promisor for failure to file; however, the loss to the seller must have resulted from the promisor's breach.<sup>51</sup>

When the conditional sale contract is properly filed, the seller holds a preference over all liens, other than the lien of a levy for property tax, but after the seller's interest has been satisfied, other liens attach in regular order of priority.<sup>52</sup> However, even if not filed, the seller's lien is entitled to preference against common creditors, although it is void as to lien creditors.<sup>53</sup> In a case wherein the ownership to the goods is in issue, the seller must not stand idly by and allow the court to enter a decree awarding title to some other party or the seller will be deemed to have waived his right to assert his title.<sup>54</sup> The seller does not have an interest in the property which would entitle him to recover rent; before default, only the buyer can rent the goods, and after default, the seller's only remedy is to retake the goods, sell them and apply the proceeds to the purchase price, but he could not allow the buyer to retain the goods and later claim rent.<sup>55</sup> Before default the usual rules applicable to

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<sup>48</sup> *Banks-Miller Supply Co. v. Bank of Marlinton*, *supra* note 47 (*semble*); however, the case is not a square holding on the point since it partially bases its conclusion on the fact that, in the contract, the buyer *promised* not to remove the property from the county of filing.

<sup>49</sup> 98 W. Va. 512, 127 S.E. 325 (1925).

<sup>50</sup> 98 W. Va. at 515; *accord*, *Banks-Miller Supply Co. v. Bank of Marlinton*, 106 W. Va. 583, 146 S.E. 521 (1929), as to actual notice to creditor after removal from one county to another without recordation in the county to which removed.

<sup>51</sup> *Accord*, *Finance Co. of America v. Bailey*, 106 W. Va. 651, 146 S.E. 723 (1929), in which no recovery was allowed where the loss to the seller resulted from his failure to locate the goods, and not from the promisor's failure to record, but where the goods were located and could not be repossessed because of the failure of the promisor to record, damages were recoverable. (No recovery was allowed, however, because there was a lack of proof of the value of the goods.)

<sup>52</sup> *Moran v. Lecony Smokeless Coal Co.*, 122 W. Va. 405, 10 S.E.2d 548 (1940); see *Banks-Miller Supply Co. v. Bank of Marlinton*, 106 W. Va. 583, 146 S.E. 521 (1929).

<sup>53</sup> See *Moran v. Lecony Smokeless Coal Co.*, *supra* note 52, at 416.

<sup>54</sup> See *C. H. Sprague & Son v. Price Hill Colliery Co.*, 124 W. Va. 31, 35, 18 S.E.2d 799 (1942).

<sup>55</sup> *C. H. Sprague & Son v. Price Hill Colliery Co.*, *supra* note 54.



creditors and debtors are applicable. Therefore, if the debtor-buyer places money in the hands of the creditor-seller, the debtor-buyer has the right to direct the payment of that money; but if no direction is made, the creditor-seller has the right to apply the money to the debts as he sees fit.<sup>56</sup>

The buyer has the beneficial or equitable right in the goods bought under a conditional sales contract.<sup>57</sup> In *Cook v. Citizens Ins. Co.*, the court said: "The quality of equitable right is not affected by a balance due on the purchase price. Equitable title is not dependent on the amount paid, but rests rather 'on beneficial ownership and the right to the use of the income.'<sup>58</sup> Apparently, the interest which the *buyer* has is subject to a distress warrant for rent, but the conditional seller's interest is paramount.<sup>59</sup> When the buyer defaults, he has no title or right to possession against the seller and cannot recover from the seller for repossessing the goods without legal process or by abortive process.<sup>60</sup>

Before the seller can recover from the indorsers of the note of the buyer, where there has been a default by the buyer with less than fifty per cent to be paid on the purchase price, the item must have been sold pursuant to the act before the instituting of the action or the buyer and, a fortiori, the indorsers are relieved from liability.<sup>61</sup> However, where the seller assigns the notes and guarantees them, the assignee does not accept the responsibility of repossessing and reselling the goods; this duty remains with the

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<sup>56</sup> *Tildesley Coal Co. v. American Fuel Corp.*, 130 W. Va. 720, 45 S.E. 2d 750 (1947).

<sup>57</sup> *Cook v. Citizens Ins. Co.*, 105 W. Va. 375, 143 S.E. 113 (1928); see *Houseman v. Home Ins. Co.*, 78 W. Va. 203, 212, 88 S.E. 1048 (1916), wherein the buyer's interest was sufficient to comply with a sole and conditional ownership clause of an insurance policy. *But cf. Moran v. Lecony Smokeless Coal Co.*, 122 W. Va. 405, 10 S.E.2d 548 (1940), where the court said there was a conflict of authority as to the buyer's interest, recognized that the buyer has some character of ownership, but said the buyer does not have legal or equitable title for tax purposes.

<sup>58</sup> 105 W. Va. 375, 377, 143 S.E. 113 (1928), *But cf. Tildesley Coal Co. v. American Fuel Corp.*, 130 W. Va. 720, 45 S.E.2d 750 (1947), where the court emphasized the fact that the buyer had paid all but a small amount of the purchase price in reaching a conclusion that the buyer was such a beneficial owner that he could sell the item to a third person subject to the conditional seller's "lien" for the balance of the purchase price.

<sup>59</sup> *Hawley v. Levy*, 99 W. Va. 335, 128 S.E. 735 (1925) (*semble*). For a discussion of the problem of creditors of the buyer reaching the buyer's interest while the seller's interest is still paramount, see: Note, 42 W. VA. L.Q. 152 (1936).

<sup>60</sup> *Kisner v. Commercial Credit Co.*, 114 W. Va. 811, 174 S.E. 330 (1934).

<sup>61</sup> *Central Acceptance Corp. v. Frye*, 103 W. Va. 689, 138 S.E. 369 (1927).

conditional seller of the goods.<sup>62</sup> The court has been lenient in construing the meaning of the provision of section 16<sup>63</sup> allowing the seller to repossess without legal process if there will be no breach of the peace.<sup>64</sup> After the seller has repossessed, if more than fifty per cent of the purchase price has been paid, there must be a resale within thirty days; however, where less than fifty per cent of the purchase price has been paid, if there is no demand by the buyer, the seller can voluntarily resell as is provided in the compulsory resale section. Since no time is stated for this voluntary resale, it must be within a reasonable time, prompt action normally being required.<sup>65</sup> Where a compulsory resale is called for, the seller must account to the buyer the amount received by a private resale, and the buyer can recover his damages from a failure to publicly sell as required, but apparently the seller has the right to set-off debts owed him by the buyer outside the conditional sale contract.<sup>66</sup> Usually, when the goods are sold at a public sale, they must be physically present at the time and place of the sale.<sup>67</sup> However, there are exceptions to this general rule.<sup>68</sup> By repossessing the property without resale, the seller relieves the buyer from all obligation under the conditional sale contract. However, where there has been a cash down payment or a promissory note in lieu thereof, the seller can still enforce this note even though he retains possession of the goods, for, unless it so specifies, such a note is

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<sup>62</sup> See *Midland Investment Co. v. Nelson*, 107 W. Va. 220, 224, 148 S.E. 9 (1929).

<sup>63</sup> W. VA. CODE c. 40, art. 3, § 16 (Michie 1955).

<sup>64</sup> See *Richardson v. Lumbermen's Ins. Co.*, 122 W. Va. 82, 86, 7 S.E. 2d 436 (1940), in which the prying open of a locked automobile door was said not to be a breach of the peace, although reprehensible; however, the court, at 85, said: "We wish to emphasize the fact that the question of whether the method that was used to repossess the car was justified or is to be approved is not here involved. If it were we should emphatically disapprove that method."

<sup>65</sup> *Central Acceptance Corp. v. Massey*, 107 W. Va. 503, 148 S.E. 864 (1929).

<sup>66</sup> *Underwood v. Raleigh Transportation, Equipment & Construction Co.*, 102 W. Va. 305, 135 S.E. 4 (1926) (*semble*).

<sup>67</sup> *Commercial Investment Trust v. Browning*, 108 W. Va. 585, 52 S.E. 10 (1930).

<sup>68</sup> *Emery's Motor Coach Lines v. Mellon National Bank & Trust Co.*, 136 W. Va. 735, 68 S.E.2d 370 (1951), involved a deed of trust of busses used in public transportation, the court saying public service, which the company was obligated to furnish, would be disrupted by requiring the busses to be physically present at the public sale; however, the effectiveness of this decision is weakened by the court's alternate reliance on a provision in the deed of trust for a private sale.

not a part of the conditional sales agreement.<sup>69</sup> Even though there can be no waiver of the provisions of the act before or at the time of making the contract,<sup>70</sup> by express language, the parties can substitute a new contract for the old contract, *after* the old one has been entered into.<sup>71</sup>

The Uniform Sales Act, by requiring recordation of the contract, is intended to protect creditors and purchasers who do not have notice of the reservation of title in the vendor, but the state is neither a creditor nor a purchaser when it condemns conditionally sold property for illegal use thereof by the buyer; therefore, the state cannot invoke the act to defeat the seller's interest.<sup>72</sup> When goods sold under a conditional sale contract are taken upon the premises of the buyer, they are liable for the buyer's rent unless the landlord is given actual or constructive notice of the seller's interest.<sup>73</sup> Unless the seller, by terms of the contract or by his subsequent conduct, has given express authority to the vendee to keep the property in repair, the interest of a conditional seller has priority to that of the lien of a mechanic for repairs.<sup>74</sup> Where the conditional seller sells to special receivers appointed by the court, the goods to become a part of a plant, the prior lienors' rights are superior to those of the conditional seller after the goods are affixed to the plant.<sup>75</sup> Goods sold under a conditional sale contract which is not recorded and no notice of which is given to creditors are subject to a deed of trust on all goods to be acquired in the future by the buyer in priority to the claim of the conditional seller.<sup>76</sup> Certain rules established by comity, such as the rules governing recordation of certain instruments,<sup>77</sup> are subject to change

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<sup>69</sup> *West Virginia Mack Sales Co. v. Brown*, 81 S.E.2d 103 (W. Va. 1954); two judges dissented; the majority opinion indicates that a reference in the note to the conditional sale contract or vice versa might cause a contrary result, showing the necessity for careful drafting of the instrument.

<sup>70</sup> W. VA. CODE c. 40, art. 3, § 26 (Michie 1955).

<sup>71</sup> *Davis v. International Harvester Co. of America*, 110 W. Va. 121, 157 S.E. 584 (1931) (rehearing denied April 3, 1931); one judge dissenting.

<sup>72</sup> *See State v. Hall*, 91 W. Va. 648, 653, 114 S.E. 250 (1922).

<sup>73</sup> *Hufford v. Akers*, 52 W. Va. 21, 43 S.E. 124 (1902).

<sup>74</sup> *Commercial Credit v. Oakley*, 103 W. Va. 270, 137 S.E. 13 (1927), citing, at 271, 2A U.L.A. 84; *Scott v. Mercer Garage Co.*, 88 W. Va. 92, 106 S.E. 425 (1921).

<sup>75</sup> *Lazear v. Ohio Valley Steel Foundry Co.*, 65 W. Va. 105, 63 S.E. 772 (1909).

<sup>76</sup> *Triumph Electric Co. v. Empire Furniture Co.*, 70 W. Va. 164, 73 S.E. 325 (1911).

<sup>77</sup> *Southern Finance Co. v. Zegar*, 120 W. Va. 420, 198 S.E. 875 (1938); *General Motors Acceptance Corp. v. Trussler*, 122 W. Va. 300, 9 S.E.2d 145 (1940).

by the legislature; however, the exercise of this right by the legislature in one field, as in the field of conditional sales contracts, does not in any way affect or limit the recordation requirements of other security arrangements, not expressly included.<sup>78</sup>

The act makes special provision for the sale of fixtures on conditional sale contracts,<sup>79</sup> which causes a preliminary question of the meaning of the word "fixture." In *Freeman v. Traux*,<sup>80</sup> the court held that if the removal of the goods could be effected without material injury to the building, and if there is not evidence of intention that the goods should become a permanent acquisition to the freehold, the goods are not fixtures within the meaning of the act.

Where goods are delivered, under a recorded conditional sale contract, to one who deals in that kind of goods, the seller is not protected against a bona fide purchaser in the ordinary course of the conditional buyer's business, if the seller expressly or impliedly consents to the buyer's reselling the goods.<sup>81</sup> Express consent is not necessary, the statute contemplating admission of evidence as to the acts and words of the seller which would amount to implied consent.<sup>82</sup>

Where a conditional sale is valid in another jurisdiction in which it was executed without recording, it is valid in West Virginia, since section 5 does not affect a sale not taking place in this state.<sup>83</sup> However, section 14 does affect such a conditional sale where the goods are brought into this state, requiring either recordation or actual notice within ten days after notice of the removal.<sup>84</sup>

### *Jurisdictional Comparison*

In comparing the act and the decisions thereunder with the draft of the commissioners and the comments of intention thereto,<sup>85</sup>

<sup>78</sup> *Southern Finance Co. v. Zegar*, *supra* note 77; *Bank of Quinwood v. Marcum*, 133 W. Va. 743, 58 S.E.2d 284 (1950).

<sup>79</sup> W. VA. CODE c. 40, art. 3, § 7 (Michie 1955).

<sup>80</sup> 103 W. Va. 132, 136 S.E. 697 (1927) (No. 5787).

<sup>81</sup> W. VA. CODE c. 40, art. 3, § 9 (Michie 1955); *Dransfield v. Boone-Armstrong Motor Car Co.*, 102 W. Va. 370, 135 S.E. 286 (1926).

<sup>82</sup> *Dransfield v. Boone-Armstrong Motor Car Co.*, *supra* note 81.

<sup>83</sup> W. VA. CODE c. 40, art. 3, § 5 (Michie 1955); *Richardson v. Lumbermen's Ins. Co.*, 122 W. Va. 82, 7 S.E.2d 436 (1940).

<sup>84</sup> *Richardson v. Lumbermen's Ins. Co.*, *supra* note 83.

<sup>85</sup> 2 U.L.A. (1922); 2A U.L.A. (1924); note: 2 U.L.A. was compiled prior to West Virginia's adopting the Uniform Conditional Sales Act.

it is gratifying to note that the West Virginia court has fulfilled the obligation of section 30<sup>86</sup> of the act as to uniformity of interpretation. Of course, where the wording of the West Virginia act is different from that of the draft by the Commissioners on Uniform Laws, a different interpretation by the court can be anticipated.<sup>87</sup> However, the general intention of the act to make uniform the law of the varying states who adopt the act<sup>88</sup> has been adhered to, with the result that the outcome of a particular case can be more easily predicted by attorneys attempting to advise clients, since if no West Virginia case covers the problem at hand, the comments and cases covering the act from other jurisdictions can be relied upon to the extent, at least, that those jurisdictions themselves uphold the obligation of uniformity of interpretation.

H. R. A., Jr.

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<sup>86</sup> W. VA. CODE c. 40, art. 3, § 30 (Michie 1955).

<sup>87</sup> The matter of difference in wording between the West Virginia and the commissioners' drafts of the Uniform Conditional Sales Act has been previously discussed in this note.

<sup>88</sup> W. VA. CODE c. 40, art. 3, § 30 (Michie 1955).